AMERICAN
LAND TITLE
ASSOCIATION

Testimony of the American Land Title Association Before the House Small Business Committee

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Thank you for the opportunity to submit testimony on the proposed rule to amend the existing regulations of the Real Estate Settlement Procedures Act ("RESPA"). We respectfully submit this statement on behalf of the American Land Title Association ("ALTA" or "Association"), the national trade association of the land title industry. Our membership is composed of nearly 3,000 title insurance companies, title insurance agents, independent abstractors, escrow officers and attorneys who search, examine, and insure land titles to protect owners and mortgage lenders against losses from defects in title. Many of these companies also provide additional real estate information services, such as tax search, flood certification, tax filing, and credit reporting services. These firms and individuals employ nearly 100,000 persons and operate in every county in the country.

ALTA and its members commend the U.S. Department of Housing and Urban Development ("HUD" or "Department") for its stated objectives in the proposed rule. The Association agrees that it is important for consumers to better understand their real estate mortgage transactions, and to receive easy-to-understand and reliable information about loan terms and settlement costs to facilitate consumer shopping for mortgages and title-related services. We recognize that the Department has devoted substantial time to surveying the varying interests of settlement service providers and studying consumer reactions to proposed disclosures, and the Association applauds HUD's commitment to reforming its RESPA regulations.

We are concerned, however, that certain provisions of the Department's proposals will not achieve those objectives and, indeed, may create problems that undermine those objectives. For example: (1) the proposed Good Faith Estimate ("GFE") is long and complicated and does not allow for an easy comparison to the HUD-1 Settlement Statement ("HUD-1"); (2) the imposition of tolerances and volume discounts create an anti-competitive environment that could disadvantage small businesses and give consumers fewer choices of settlement service providers and; (3) the imposition of responsibility on the closing agent to read and interpret the closing script on behalf of the borrowers will increase costs for both sellers and borrowers.

We believe that RESPA reform cannot be resolved in one sweeping change without considering and appreciating the many moving parts of a residential real estate transaction. The Association, therefore, urges the Department to carefully consider the potential problems and impractical effects of the proposed rule, many of which we will discuss below. ALTA is committed to working with the Department to craft a solution that both benefits consumers and does not adversely affect the Association's members.

The Association's comments on the proposed rule are organized as follows: Part I provides an executive summary of this comment letter. Part II discusses several of the main concerns ALTA has with the proposed rule. This part focuses on the Department's proposals for: (1) a closing script; (2) the disclosure of certain title insurance items on the GFE and the HUD-1; (3) the use of average cost pricing and related restrictions on government recording fees; and (4) negotiated volume discounts. Part III provides comments on other aspects of the proposed rule and responds to questions posed by the Department. Finally, Part IV concludes with alternative approaches to HUD's planned disclosures that ALTA believes will achieve the Department's objectives for the rule without the adverse consequences identified in Part II.

I. EXECUTIVE SUMMARY

Although ALTA supports the Department's underlying objectives for the proposed rule, the Association believes the Department is attempting, by regulation, to convert a statute and regulatory regime designed to (a) alert consumers to the range of closing costs they are likely to encounter (the GFE) and (b) provide a nationwide form that will reflect the distribution of the buyer's and seller's funds at closing (the HUD-1) into a new regime that was not intended by Congress and is not authorized by the statute. Irrespective of whether HUD's objectives are praiseworthy (and they are), the rule's new processes and procedures, which HUD deems necessary to achieve its objectives, are more than the statutory framework can bear.

A. Closing Script

We believe that HUD has absolutely no statutory authority to place on title companies and closing agents the obligations contained in its closing script regulations. Suggesting that HUD has such authority by characterizing the closing script as a mere "addendum" to the HUD-1 settlement statement only demonstrates that HUD itself cannot find the statutory authority for such obligations. We, therefore, believe that HUD is forced to find a tenuous link to some statutory provision for these very new, and very substantive, obligations.

Not only is there no statutory authority for HUD to impose these new regulatory requirements on title and closing agents, but, as a matter of sound policy, such new regulatory obligations can and should **only** be placed on the shoulders of the mortgage lender. There are a number of reasons why this is so.

First and foremost, under the proposed regulations, it is unclear what, if anything, the buyer/borrower or the closing agent can do if there are significant discrepancies between the final documents/ instructions sent by the lender at the time of closing and the terms of the loan or estimated settlement costs provided by the lender to the consumer at the application stage. The information HUD believes should be provided in the closing script is information that lenders should be required to provide at an earlier date – well before closing – so that the consumer can take action on the basis of the new information before their rate lock expires or their moving van is packed. In short, the "education" that HUD wants to provide to consumers through the closing script comes too late in the process and from the wrong party to provide any benefit to consumers. It will only provide confusion.

Second, in many states, settlement agents risk engaging in the unauthorized practice of law by reviewing loan documents and answering borrower questions about final loan terms. The closing script, which postpones the resolution of any unclear terms until closing, will certainly place settlement agents in the position of either answering those questions, in violation of state law, or delaying the closing until the borrower can resolve those questions or concerns with their lender.

Third, in states where no such concerns over the unauthorized practice of law exist, the proposed closing script, contrary to HUD's estimate, will significantly increase the amount of time required for closing. In its estimate, HUD took into consideration only the amount of time necessary to read the script to the borrower. It did not include the significant amount of time that will be necessary to address questions or resolve discrepancies in connection with loan terms and final settlement costs. This will not only increase the amount of time required to close a transaction but, as a result, will decrease the number of closings a settlement agent can perform. These are factors that will almost certainly result in higher closing fees charged to the borrower and seller.

Finally, the Association believes that HUD may not fully appreciate the impracticalities that will prevent implementation of the closing script as proposed. For instance, not all real estate settlements are conducted face-to-face with the borrower, which makes it impossible to read aloud the closing script in such "escrow closings". Moreover, in the absence of a binding obligation on lenders to provide the closing script information to the closing agent well in advance of closing, the closing agent will be unable to prepare the closing script if there is any delay by the lender. ALTA, therefore, believes these insuperable problems suggest the mortgage lender is in the best position to prepare the closing script or an alternative document, which should be presented at some point prior to closing. This will ensure there is a meeting of the minds between the lender and the borrower as to what the lender thinks it is providing and what the borrower thinks he or she is getting. Requiring the closing agent to develop this mutual understanding at settlement imposes the obligation on the wrong party at the wrong time in the transaction.

B. <u>Title Insurance Fee Disclosures</u>

With regard to the GFE and HUD-1, ALTA asks the Department to reconsider the disclosure of certain title insurance services and fees on both of these disclosures. Most importantly, HUD should continue to require the itemization of all title-related charges on both the GFE and HUD-1, so that consumers can match specific services to their individual needs and more easily shop for the title insurance services they desire. For example, lenders are primarily concerned with verifying that there are no liens against a property or judgments against their borrower and may, therefore, be willing to accept a low cost, limited title search. Borrowers purchasing a property, on the other hand, want to know that they have good title to the land they are acquiring without easements and restrictions. These "clouds" on title can only be found through a more extensive and costly search. Unless the cost of a title search is itemized on the GFE and HUD-1, there will be no way for borrowers to compare the scope of the services that are included in the costs they are quoted.

In addition, we believe that use of the word "optional" to identify owner's title insurance is misleading to consumers and could conflict with state-specific practices that require owner's coverage in residential real estate transactions. The proposed disclosure of the title agent's and title underwriter's portion of the title premium also serves no useful purpose on the HUD-1 and does not aid consumers in their understanding of title insurance fees.

C. Recording Fees and Average Cost Price

While ALTA continues to question the Department's authority to impose tolerance limitations on estimates provided by lenders, we ask HUD to remove government recording fees from the proposed zero tolerance category. Such fees are rarely known to mortgage lenders or title insurance companies at the GFE stage, and there are a number of reasons why these fees may change before or after closing. Alternatively, if all settlement service providers were authorized to charge consumers the average cost price, the Association believes the certainty of the average cost price would benefit both consumers and our members, particularly as it relates to recording fees. Accordingly, if the Department's intent with the rule is to provide such authorization, we ask HUD to clarify these average cost price provisions.

D. Volume Discounts

Finally, it is the Association's position that volume discounts are anti-competitive and will disproportionately harm small businesses. Small independent title agencies do not have the resources to guarantee a stream of business to local title-related service providers or discount their own prices to compete with large national title providers. While such discounts may result in lower prices for the consumer in the short term, once the small businesses have been pushed out of the competitive marketplace, large providers are left to compete only among themselves. Under these circumstances, consumers will have fewer choices for title and closing related services, and prices will inevitably increase. Because this conflicts with HUD's stated objectives for the new regulations, we ask the

Department to reconsider the effects of volume discounts on both consumers and ALTA's members.

In addition, the use of volume discounts is inconsistent with state regulators' interest in protecting the solvency of title insurance companies. Because title insurance claims may come decades after purchase of the policy, state regulators have a strong interest in preserving the solvency of title companies to ensure that consumers are protected. State laws require that title premiums be "adequate." Severe discounting of title services could threaten the adequacy of the premium reserves.

E. Recommendations

Based on these concerns, ALTA proposes that HUD limit their efforts to simplifying the GFE and HUD-1 so that easy comparisons can be made. Page one of HUD's proposed GFE provides information about the loan terms and the total costs for settlement services in an understandable format. ALTA supports this type of summary page, but, in addition, ALTA urges HUD to improve individual fee disclosures by using a page that is identical to page two of the present HUD-1. This would allow consumers to know what is included within the total amount listed on the GFE summary page and more directly compare the fees to the final charges at closing.

II. ALTA HAS SIGNIFICANT CONCERNS ABOUT HUD'S PROPOSALS

There are a number of important issues and problems raised by the proposed rule; however, for purposes of this correspondence, we focus on four particular aspects of HUD's proposals. The Association believes these four items could hinder a consumer's understanding of title insurance and settlement fees, increase ultimate costs to consumers, and have a severe adverse impact on our member's delivery of settlement services. We discuss each of these four items below.

A. The Responsibility for Ensuring that Consumers Understand Final Loan Terms and Settlement Costs Should Rest with the Mortgage Lender.

Following the Department's 2005 RESPA roundtables, settlement service providers expected HUD's eventual new and improved RESPA disclosures to focus on the GFE, which garnered the most attention in these discussion groups. While the Department has proposed drastic changes to the GFE in this proposed rule, HUD also has invented a new "addendum" to the HUD-1 in the form of a closing script. The closing script, however, is not a disclosure about which the Department sought input from settlement service industries, and, as a result, ALTA believes the proposed disclosure is a flawed and impractical solution to "ensure that at settlement, borrowers are aware of final loan terms and settlement costs."[1]

A closing agent also fills a specialized role in a real estate settlement. The proposed HUD-1 addendum would impose new responsibilities and liabilities on the closing agent that most closers are prohibited from undertaking and which are not authorized or contemplated in any statutory provision of RESPA. In fact, this proposal would shift the closer from the position of an independent third party intermediary to an apparent agent of the lender. This is a significant and dangerous change to the essential role that title and other closing agents have traditionally played in the real estate process. Although the Association agrees that it is important for consumers to understand their mortgage loan and settlement costs, this is a responsibility best fulfilled by the mortgage lender who originates the loan and discloses settlement costs on the GFE.

1. Nothing in RESPA's Statute Authorizes HUD to Require a Settlement Agent to Prepare a Closing Script.

Initially, ALTA questions whether HUD has the statutory authority under RESPA to require settlement agents to prepare and provide a closing script. This is a brand new concept, which we assume HUD derives from its statutory authority to develop a uniform settlement statement. However, nothing in these statutory provisions remotely authorizes the kind of new and substantive obligations that HUD is seeking to impose on title and closing agents. The Department cannot hide this lack of authority by claiming these obligations are merely an "addendum" to the HUD-1 form. Instead, if HUD were to use any statutory authority for imposing such obligations on anyone, that authority can only be derived from the obligations RESPA imposes on **lenders** to provide the GFE.

2. To Comply With HUD's Proposed Closing Script, Closing Agents Risk Committing the Unauthorized Practice of Law.

According to the proposed regulations, HUD proposes to require the "settlement agent or other person conducting the settlement" to read the closing script aloud to the borrower and explain, among other things, the loan terms as contained in the mortgage documents. By placing a closing agent in the role of explaining loan terms and settlement charges, a consumer is likely to view the closing agent as an expert who can advise the consumer as to the particulars of the transaction or answer any question regarding their loan. However, many states allow only licensed attorneys to answer borrower questions and explain the details of a mortgage loan transaction. If HUD requires a settlement agent to be responsible

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[1] 73 Fed. Reg. 14030, 14033 (Mar. 14, 2008).

for reviewing loan documents and explaining the loan terms to a borrower at closing, the agent may be forced to commit the unauthorized practice of law under many state laws. Alternatively, only attorneys will be able to close transactions in those states, which will undoubtedly increase settlement costs.

For example, in Virginia, title insurance companies and agents must adhere to the state's Unauthorized Practice of Law Guidelines for Real Estate Settlement Agents ("Guidelines").[2] While a title entity may conduct the closing, prepare the HUD-1, receive and disburse funds, and record mortgage documents, the entity is prohibited under the Guidelines from drafting legal instruments and explaining the legal obligations of the parties under the loan documents. Similarly, the North Carolina State Bar has identified a list of services, which if performed by a non-lawyer, will constitute the unauthorized practice of law in the state. One such service is:

> Provid[ing] a legal opinion or advice in response to inquiries by any of the parties [at closing] regarding legal rights or obligations of any person, firm, or corporation, including but not limited to the rights and obligations created by a promissory note, the effect of a pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust.[3]

Accordingly, if a title company or other non-lawyer closing agent in states like Virginia or North Carolina is required to read aloud a closing script to the borrower, the closing agent would be prohibited in those states from providing any explanations to the borrower with regard to the loan terms identified in the closing script. If HUD's objective for the closing script is to ensure that consumers understand their mortgage loan, a closing agent precluded from providing explanations to the borrower is the wrong person to provide this clarity. Instead, if certain loan term information is to be emphasized to the borrower at or prior to closing, the mortgage lender originating the loan should be tasked with this explanation.

3. The Proposed Closing Script Will Increase the Time Required for Closing and Resulting Closing Fees.

The Department spends a considerable amount of time in the proposed rule and in its Regulatory Flexibility Analysis discussing the amount of savings consumers will enjoy as a result of HUD's proposed disclosures in the rule. Yet, with

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[2] See "Unauthorized Practice of Law (UPL) Guidelines for Real Estate Settlement Agents," Parts V and VI, available at www.vsb.org/site/regulation/upl-guidelines-for-real-estate-settlement-agents.

[3] Authorized Practice Advisory Opinion 2002-1, N.C. State Bar, Jan. 24, 2003.

regard to the proposed closing script, the rule fails to appreciate the amount of additional time it will take a closing agent to prepare and read the closing script, and the effect this will have on a closing agent's resulting fee. In fact, HUD estimates that it will take an additional 45 minutes to close a loan with the closing script. This, however, is an underestimation if the goal of the script is to ensure borrower questions are answered and consumers leave the closing table understanding the terms and the costs of their loan. Our members estimate an additional 30 minutes will be needed just to respond to the questions raised by the closing script.

More specifically, HUD does not appear to anticipate the fact that borrowers will ask questions about the items identified in the closing script that the settlement agent may be unable to answer due to the legal prohibitions discussed above or a lack of knowledge and information. If state unauthorized practice of law provisions prohibit a closing agent from explaining loan terms to a borrower and a borrower has questions, a closing agent will be forced to stop the closing and contact the lender for the proper answers and explanations for the borrower. Similarly, the borrower may ask why there is a discrepancy between the final and estimated settlement charges the lender provided. The timeliness of these answers is dependent on the lender and whether the appropriate person can be reached in a single telephone call during the lender's normal business hours.

As a result, a normal hour-long closing may turn into two or even three hours to answer the borrower's questions, and the settlement agent will be forced to scale back the number of closings the agent can complete in one day. That will substantially increase the burden on closers, especially small independent businesses. With fewer daily closings, the settlement agent may be forced to increase its closing fees to sustain its operations. Although HUD already anticipates a $54 increase in closing fees to account for the time spent reading the closing script, the Association is concerned that this is too low by an order of magnitude.

The proposed rule also fails to recognize that most closings occur at the end of the month. There are many reasons for this, including the payment of daily taxes and interest charges, to name a few. HUD's economic analysis, however, fails to take into account that closers will not have the physical space or the man power to accommodate the same number of closings at the end of the month given the increased time necessary for completion of the closing documents and explanations. This will disproportionately harm smaller settlement companies and agents.

If HUD's response to these points is that the closing agent need not answer any questions that the consumer may have, then the closing script obligation will either result in a very unhappy consumer – one whose anger will be more directed at the closing agent than the lender – or the closing script could just as easily have been delivered in writing by the lender to the borrower after closing. In other words, if HUD is not expecting a consumer to be able to take any action at the closing table as a result of having heard the closing script, then why is it essential that the closing script be provided to the borrower at the time of settlement?

Given these issues, ALTA believes the Department can eliminate any uncertainty regarding the time required to close a transaction by shifting the responsibility to explain loan terms and final settlement charges to the lender. The lender is responsible for the ultimate loan product reflected in the mortgage documents to be signed at the closing table. If the Department is concerned about resolving situations where a borrower is unaware or unsure of the terms of the loan, it should be the lender's responsibility to identify exact loan terms and explain them to the borrower before he or she gets to the closing table. Otherwise, the closing agent merely identifies final loan terms for the borrower without any ability to ensure the borrower understands them. This process could prove to take more time and be more expensive, with less benefit to the consumer, which is contrary to the Department's stated objectives for the rule.

4. The Proposed Rule Provides No Guidance for Settlement Agents When Inconsistencies in Mortgage and Closing Documents are Identified.

In preparing the closing script, the proposed rule obligates the settlement agent to disclose and explain to the borrower any inconsistencies between the mortgage note, between related settlement information and the GFE, and between the HUD-1 and the GFE. Other than this instruction, the rule fails to provide any guidance for the settlement agent to take action when these inconsistencies are identified. For instance, the rule provides no guidance for the settlement agent in circumstances where the lender exceeds the applicable tolerances or has changed the terms of the loan from that expected by the borrower. The rule is clear, however, that exceeding the tolerances violates Section 4 of RESPA. But, what is the settlement agent to do? If the lender exceeds the stated tolerances by $96 (as set forth in Example 6 of the sample closing scripts)[4] and the settlement agent closes the transaction, the settlement agent may find itself the defendant in a class action lawsuit.

In addition, HUD states that its intent for the closing script is to ensure borrowers are aware of and understand the loan terms. The rule, however, does not address how a settlement agent should proceed with the closing when the final loan terms are not the same as the loan terms disclosed on the GFE. If the settlement agent is prohibited by state law from explaining loan terms to the borrower and the lender is unreachable at the time of settlement, the closing agent may be forced to

[4] See 73 Fed. Reg. at 14089-14092.

delay the closing. This is small comfort to a consumer whose worldly possessions are in a moving van parked outside the settlement agent's office.

Furthermore, the rule subjects certain settlement charges to different tolerances depending on whether the borrower uses a lender-recommended settlement service provider or shops independently for a provider. In completing the comparison chart portion of the closing script, the rule does not identify how a settlement agent is supposed to know which service providers are borrower-selected and not subject to tolerance calculations. This is yet another example of how HUD's proposed rule puts the settlement agent on the spot to resolve issues created by the lender, which, without instructions from the lender, cannot be resolved. ALTA believes the proposed closing script rules fall short of providing realistic instructions to make the disclosure useful to the consumer.

5. Implementation of the Proposed Closing Script Creates Several Practical Problems.

The Department's proposed rule also fails to appreciate the realities of modern-day real estate settlements. As a result, the Association is concerned that the rule, if finalized, would be impractical and impossible to implement.

For example, the proposed rule would require the settlement agent to read the closing script aloud to the borrower at closing. Such a requirement assumes that all residential real estate closings are conducted face-to-face with the buyer and the seller around an actual closing table. However, not all residential real estate closings are conducted in this manner. On the West Coast, escrow companies conduct closings and arrange for the transfer of real estate without the buyer and seller having to be present at a face-to-face closing. In addition, more and more settlement companies offer the convenience of closings by mail or via the internet, where buyers and sellers separately receive final closing and mortgage documents, execute them in the presence of a self-selected notary, and return them to the settlement agent by the scheduled closing date. In each of these circumstances, escrow officers and/or settlement agents do not meet with the borrower face-to-face and would not have the opportunity to read a closing script to the borrower. Yet, the proposed rule provides no alternatives and would not allow a settlement agent to forego the reading aloud component of the closing script. Given the varying procedures for real estate closings across the country, this requirement is impractical and impossible to implement as designed by the Department.

Moreover, HUD's proposed rule is silent with regard to the language of the closing script, although the examples provided in the rule show the closing script only in English. Borrowers, however, often speak languages other than English, and the rule does not address whether the Department expects the settlement agent to translate the script into the borrower's language. If a settlement agent must read aloud a script in a face-to-face closing and obtain the borrower's written acknowledgment that the settlement agent explained the loan terms, this may be an impossible task if the borrower does not speak and understand English. HUD states that its purpose for the closing script is to ensure that borrowers are aware of the final loan terms and settlement charges; yet the Department fails to appreciate that language could be the first barrier to a borrower's understanding of these items.

Finally, the rule fails to appreciate the time frame within which a settlement agent must prepare for closing. Although the rule would require the loan originator to transmit to the settlement agent the necessary information to complete the closing script, the rule fails to obligate the loan originator to provide such information within a specified period of time to ensure the settlement agent is able to prepare the closing script and provide it to the borrower 24 hours prior to closing. In fact, settlement agents often do not receive the closing package and instructions from the lender until shortly before closing. Should a lender fail to provide a settlement agent with the required information in a timely fashion, the closing agent risks the additional liability that could result from its failure to prepare and provide the borrower with a copy of the HUD-1 and closing script prior to closing. Furthermore, at this point, the settlement agent has little time to prepare the actual closing script, which could threaten a settlement agent's ability to close the borrower's transaction in a timely fashion. Accordingly, not only is timing an impractical (or missing) aspect of the proposed closing script, it is yet another reason why mortgage lenders are best suited to explain final loan terms and settlement charges to their borrowers.

B. The Disclosure of Certain Settlement Services and Title Insurance Fees is Misleading and Could Discourage Consumer Shopping.

Although one of HUD's purposes for the proposed rule is to simplify and improve consumer disclosures, ALTA believes certain of the rule's disclosures related to settlement services and title insurance fees are misleading, could discourage consumers from shopping for services that are in the buyer's best interest, and could competitively disadvantage the Association's members. ALTA fully supports the Department's objective of clarity, but we believe the rule goes too far in simplifying the disclosure of settlement services and could create confusion about the role of title insurance in the settlement process.

1. The Disclosure of a Single Price for "Primary Title Services" Does Not Allow a Consumer to Comparison Shop.

In a departure from current requirements regarding the itemization of settlement charges in both the GFE and on the HUD-1, the proposed rule would require that a single fee be disclosed for "title services and lender's title insurance" in block 4 of the GFE and for "primary title services" in the 1100 section of the HUD-1.[5] The elimination of required itemization for these fees is of immense concern to ALTA and can only serve to lessen, rather than enhance, competition for these services.

HUD's belief that (a) consumers shop among lenders based on the lender's estimates of the 1100 series charges, and (b) that consumers have no need to know the amounts of the various charges that comprise the aggregate amount is in error. In a purchase/sale transaction, the title-related and closing-related charges in the transaction are **not** a function of the lender's needs, but are far more a function of the needs of the buyer and seller of the property with regard to their underlying real estate transaction. In most cases, the seller (in seller-pay jurisdictions) and the buyer will have decided on the provider of title and closing services before the lender is even involved in the transaction. Thus, how the lender estimates the costs for these services should be unrelated to how buyers decide on the lender that offers the best loan at the best lender-related costs.

With regard to the itemization of individual costs that comprise the aggregate block 4 (or 1100 series) charge, consumers who want to shop for these services will be seriously disadvantaged because there is no way to determine the lender's estimated price for the title company, the escrow company, the attorney, or the surveyor. In fact, the concept that only the aggregate amount of title and closing-related charges need be disclosed is an unfortunate – and inappropriate – hangover from HUD's ill-fated "packaging" proposal in 2002. In that proposal, HUD believed – erroneously – that if a lender packages all settlement charges, the borrower has no interest in knowing what the individual charges in that package might be. Even if that view has validity in the case of a refinance loan, it has no validity in the case of a purchase/sale transaction or in the proposed regulations. HUD and ALTA ultimately want to encourage consumers to shop among providers of title and closing-related services. A lender who provides a GFE that only discloses an aggregate figure for a range of individual charges prohibits the consumer from shopping for the title (or escrow) services at a lower price than that reflected in an aggregate price on the GFE.

[5] ALTA also is concerned that HUD has effectively altered its long-standing definition and guidance regarding core title services. Notably, the rule would define "primary title services" to include "any service involved in the provision of title insurance (lender or owner policy) and <u>settlement or closing services</u>, including but not limited to: title examination and evaluation; preparation and issuance of title commitment; clearance of underwriting objections; preparation and issuance of a title insurance policy or policies; and the processing and administrative services required to perform these functions." 73 Fed. Reg. at 14056 (emphasis added). This is a sharp contrast to HUD's current definition of core title services, which includes the conducting of a closing only <u>where customary</u> and when the agent's compensation for such services is customarily <u>part of the payment or retention from the insurer</u>. 24 C.F.R. § 3500.14(g)(4); 61 Fed. Reg. 49,398-49,400 (emphasis added). If the Department's concept of core title services is changing with the proposed rule, this is an issue ALTA urges HUD to directly address in any final rule.

Similarly, with regard to the HUD-1, the entire purpose of the document is to provide a record for all parties as to how the settlement funds brought to the transaction by the buyer, seller and lender are disbursed. This information has been of value in numerous studies to determine the average or typical charges for various settlement services. But HUD's proposed handling of the 1100 series charges would undermine those objectives. By lumping together so many different charges into the category of "primary title services," no one who reads the HUD-1, including the buyer and the seller, will know how their funds were actually disbursed and to what providers.

Moreover, what exactly constitutes "primary title services" is not clear. HUD's explanatory statement describes a "primary title service" as including abstract, binder, copying, document handling, or notary fees, even if a party other than the title company listed on line 1101 provides the service.[6] However, the definition of "primary title service" in the proposed regulation is different from that description. The proposed regulation defines "primary title service" as "any service involved in the provision of title insurance (lender or owner policy) and settlement or closing services, including, but not limited to, title examination and evaluation, preparation and issuance of title commitment; clearance of underwriting objections; preparation and issuance of a title insurance policy or policies, and the processing and administrative services required to perform these functions."[7] What about title searching, abstracting, "binder," copying, document handling, document preparation, notary fees, handling of the closing, and escrow services? These services seem to be dropped from the official definition.

The instructions for completing the HUD-1[8] also indicate that those charges not encompassed by "primary title charges" include "closing attorney or escrow agent" charges. Does this mean that the closing charges made by an independent escrow company should be listed separately from "primary title services," whereas the charge for a closing made by a title company is part of "primary title services"? Similarly, while "attorney closing" services are not "primary title services" and are to be listed separately, what if the attorney is not providing closing services, but some other service, such as the examination of title? Should the attorney's fee for this "primary title service" be included in the aggregate charge? These are the types of questions that support the continued itemization of title-related services.

Finally, the disclosure of a single fee for title insurance also fails to recognize that, in most areas of the country, the seller generally pays a substantial portion of

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[6] 73 Fed. Reg. at 14049.

[7] Id. at 14056.

[8] Id. at 14060.

the title insurance charges. The Department appears to assume that the borrower pays for all closing costs, including the fees for "primary title services," and the proposed rule provides no instruction as to how to disclose title-related fees when these costs are paid by the seller. If the GFE and HUD-1 do not itemize the fees for title insurance services, the Association believes it is possible the borrower could pay for services sellers currently assume, which will only result in higher costs to the borrower. Without evidence that consumers do not currently understand the title insurance-related fees disclosed in the current 1100 series of the HUD-1, ALTA asks the Department to continue to require such fees to be separately itemized on both the GFE and HUD-1.

2. The Word "Optional" Should Be Removed From the Disclosure of Owner's Title Insurance.

On both the proposed GFE and HUD-1, the Department would require the cost for owner's title insurance to be disclosed separately as "Optional owner's title insurance." This reflects HUD's continuously mistaken view that, in real estate transactions, it is the loan policy that is the key policy and the owner's policy is a mere addition to the loan policy. In a purchase/sale transaction, exactly the opposite is generally the case. It is the owner's policy that is the major policy in the transaction, and the loan policy is an "add on" that is issued at a relatively small additional premium.

Moreover, by including the term "optional" in both disclosures, HUD appears to be suggesting that a consumer does not need separate coverage for title insurance, which may discourage borrowers from obtaining owner's coverage. The Association understands that it is HUD's intent to create better disclosures to reduce the consumer's overall settlement costs, but by isolating owner's title insurance coverage as a service that can be eliminated to lower fees, the Department is targeting the one item that is structured to protect the consumer in connection with a real estate transaction. The purchase of a home is the most expensive purchase most consumers will ever make, and RESPA disclosures should not in any way discourage consumers from protecting their investment.

The use of the word "optional" also ignores several significant realities regarding the sale of title insurance. Notably, in many states, owner's coverage is required in residential real estate transactions. For example, although real estate and insurance laws in Washington State do not require anyone to obtain title insurance, real estate is transferred in the state by "warranty deed," which requires the seller to guarantee to the buyer that the seller actually holds the ownership rights being sold. As a result, sellers are required to purchase title insurance protecting the buyers in Washington, which is a standard clause in real estate listing agreements.[9] By labeling owner's title insurance as optional on both the GFE and HUD-1, HUD's directive would directly conflict with requirements for the purchase of title insurance in Washington and other states. Should a consumer in one of these states elect not to purchase owner's coverage based on the GFE disclosure, consumers will only be confused when the title insurance company requires an owner's title insurance policy to close the transaction.

Even if an owner's policy is not required, many sellers often elect to purchase owner's title insurance policies for buyers. In those states where such is the custom, the rule provides no instructions as to how to disclose the cost of an owner's title policy on the GFE. Arguably, including the cost on the GFE would require the fee to be added to the consumer's total estimated settlement charges, which inflates the charges for which the consumer ultimately is responsible. On the other hand, if the cost is left blank on the GFE, the Department should expect the consumer to be confused when he or she sees the cost for owner's insurance disclosed on the HUD-1 (even if this cost appears in the seller's column of the disclosure).

HUD also fails to appreciate the fact that it is more cost effective for the consumer when a lender's policy and an owner's policy of title insurance are purchased concurrently.[10] A title search must be performed in connection with every issuance of a title insurance policy. When a title insurance underwriter can issue both a lender's policy and an owner's policy in connection with a single title search, the price of both policies costs less than if a consumer were to purchase his own title insurance policy after closing. Further, the purchase of an owner's policy at closing frequently results in savings to consumers in the future through the application of readily-available discounted "reissue" rates when borrowers refinance their loans or sell their properties. These are savings that consumers should not be discouraged from taking advantage of, particularly at the GFE stage when consumers ideally are shopping for a mortgage loan. Thus, while ALTA has no objection to the disclosure of the cost of owner's title insurance separately from a lender's policy, including the word "optional" in the disclosure is misleading and could result in higher costs for consumers in the long run. It is the Association's position that HUD should remove "optional" from both the GFE and HUD-1.

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[9] See "Title Insurance in Washington: Improving Competition and Consumer Choice," Report of the Title Insurance Review Task Force (Sept. 2007), available at www.insurance.wa.gov/publications/news/2140-Report.pdf.

[10] The rule fails to appreciate that the price for title insurance could be vastly different depending on whether only a lender's policy is purchased or both lender's and owner's policies are purchased. The rule provides no instructions as to whether the price for title insurance should be disclosed with the assumption that a consumer may choose not to purchase the "optional" owners policy or on the assumption that both policies will be issued simultaneously.

3. Itemizing the Split in Title Insurance Premiums Serves No Useful Purpose on the HUD-1.

The proposed HUD-1 includes two disclosures that HUD does not propose for the GFE. In lines 1113 and 1114 of the new HUD-1, the closing agent would be required to disclose the title agent's portion and title underwriter's portion of the total title insurance premium. Although the preamble to the proposed rule is silent with regard to the Department's reasons for such a disclosure, HUD refers to its decision to exclude such a disclosure from the GFE in its Regulatory Flexibility Analysis. With an intent to eliminate items that would place a greater burden on small businesses, HUD states that it is:

> Dropping the Title Agent/Title Insurance Premium Breakout. Title agents argued that breaking out the title insurance premium that goes to the underwriter from the rest of the title charges is costly and serves no useful purpose. This requirement has been eliminated, so there will be no compliance burden associated with the title agent/title insurance premium breakout on the GFE. *The breakout was not useful for comparison shopping*.[11]

For all of the reasons that HUD identifies above, the Association questions whether such a premium breakout serves any useful purpose on the HUD-1. The compliance burden on small title agencies in making this disclosure is no different for the HUD-1, and the disclosure certainly does not aid a consumer in understanding the title insurance fees paid as part of final settlement charges. In fact, the premium disclosure has nothing to do with the final prices the borrower pays at the closing table.

Moreover, the closing agent, if it is not also the title insurance agent in the transaction, will not know a title agent's premium split and HUD has no authority to require that title insurance agents inform the person handling the closing (such as an escrow company in western states) of the agent's level of commission in the transaction. Furthermore, no other insurance agents (i.e., homeowners, auto, and life insurance) are required to disclose the percentages of insurance premium they receive as compensation. The same is the case for other settlement service providers, such as real estate agents, who are not required to disclose the percentage of the real estate commission retained by the real estate sales person and the portion retained by the real estate brokerage company. Absent a clear statutory basis and sound policy reason for requiring title insurance agents to be singled out and forced to disclose their commissions from the title insurance company, there is no basis for HUD to require this disclosure in the HUD-1.

[11] 73 Fed. Reg. at 14109 (emphasis added).

C. **<u>All Settlement Service Providers Should Be Authorized to Charge Consumers the Average Cost of Settlement Services to Maximize the Benefit to Consumers</u>.**

ALTA applauds the Department's proposal to allow average cost pricing in an effort to protect consumers from high settlement costs. However, as written, the Association believes the rule does not go far enough to maximize potential cost savings to consumers. The proposed rule generally would allow the cost for a settlement service provided by a third party to be an average price, but the two methods proposed for calculating the average price are both based on practices of the loan originator. Accordingly, the rule appears to effectively allow only the loan originator to measure and charge the average cost price for settlement services performed by third parties. This excludes other settlement service providers, like the Association's title insurance and settlement company members, who could use average cost pricing as an important tool in providing competitive and guaranteed prices for title-related services. This is particularly significant as it relates to government recording fees, which the rule proposes to subject to a zero tolerance or, in other words, prohibit from increasing at the closing table.

Before considering the benefit of allowing title and settlement companies to calculate their own average cost price, it is imperative that ALTA comment on the Department's plan to subject government recording fees to a zero tolerance standard in a lender's GFE. In creating such a restriction, the Department ignores the reality that the amount of government recording fees chargeable to the consumer fluctuates throughout the origination process. HUD, instead, focuses on the fact that government recording fees are set by local regulations or ordinances and are well known to mortgage lenders at the time they receive a GFE application and provide a GFE disclosure to the consumer. While it may be true that lenders know that recording fees in a certain county are, for example, $2.00 for the first page and $1.25 for every page thereafter, it is impossible for a lender to know the exact number of pages that will be recorded following settlement.

Even if a standard Fannie Mae loan document in a state is 12 pages long (and would equal $15.75 in recording fees using the example above), there are many reasons why the number of pages to be recorded can change during the origination and title search process, which will always change the amount of recording fees. For instance, the addition of another signature page to the mortgage document or a need to include the property description on an exhibit page to the deed will increase the number of pages to be recorded as well as the resulting recording fees. In addition, if the title company discovers a lien on the property during a title search, a lien release must be recorded to perfect the chain of title. Each of these extra recordings will result in additional fees, which are circumstances that neither a mortgage lender nor a title company can anticipate at the time a consumer receives a GFE. As a result, it is unrealistic to expect mortgage lenders to disclose exact recording fees on the GFE and impractical not to allow these fees to change at the closing table. The Association asks the Department to reconsider its proposal to subject government recording fees to a zero tolerance under the rule.[12]

Of equal importance, the new regulation on average cost pricing is contained in the provision (§ 3500.8(b)(2)) that governs the completion of the HUD-1. This is not where the clarification is needed. It makes no sense to include a provision on "averaging" in a HUD-1 section of the regulations when such a provision is needed to permit lenders and others to apply average cost pricing without running the risk of violating § 8(b) of RESPA. The proposed regulations fail to clarify that average cost pricing is not a violation of § 8(b). HUD should ensure that its regulations relevant to that section of RESPA are amended to reflect its new policy on average cost pricing.

Ultimately, ALTA believes that if the rule would allow title and settlement companies to use the average cost price, particularly as it relates to recording fees, express delivery charges and other third party charges for which title companies must pay, consumers would benefit from the certainty the average cost price provides. Moreover, the average cost price could curb the significant threat of class action litigation for title insurance and settlement companies as it relates to recording fees. Notably, class action plaintiffs' lawyers recently have filed lawsuits against title companies based on the allegation that an overcharge in recording fees is a violation of Section 8(b) of RESPA. Yet, these overcharges are not intentional and occur because last-minute changes to the mortgage documents result in a fluctuation in the recording fees. If a title or settlement company were able to determine their average cost for recording fees in particular geographic areas and pass this average through to the consumer, ALTA's members could refocus their resources currently spent on costly class action litigation. In the end, any potential for an overcharge in recording fees is made up by lower costs for other services disclosed on the GFE. The Association, therefore, believes that it is in everyone's best interest to authorize all settlement service providers to charge settlement fees based on average cost pricing without fear of violating HUD's interpretation of § 8(b) of RESPA. If the Department's intent with the rule is to provide such a broad authorization, we ask HUD to clarify the application of the provisions in the proposed rule.

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[12] The proposed rule also states that a lender must estimate the sum of all state and local government fees, charges, and taxes, but does not instruct whether the lender must disclose only the borrower's portion of these fees. In many cases, the seller is responsible for certain recording fees, and the rule does not address whether the "sum" must include the seller's recording fees. As a result, not only should the Department reconsider subjecting total recording fees to a zero tolerance standard, but the rule should revisit the instructions it provides for completion of the GFE to be sure borrowers are shown and ultimately charged for only those government recording fees for which the borrower is responsible.

D. The Allowance of Volume Discounts is Anti-Competitive and Will Disproportionately Harm Small Businesses.

1. Small Title Companies Cannot Compete With Discounts Offered by Large Title Companies.

HUD's proposal to allow settlement service providers to negotiate volume discounts will disadvantage small title insurance companies that do not have the resources to discount their services in the same way as large companies. Yet, based on the rule's lengthy Economic Analysis, the Department seems to assume that such a proposal will not have anti-competitive effects or disadvantage small title insurance businesses. This is not the case.

In discussing the rule's impact on small businesses, the Department focuses on the local nature of title and settlement services and highlights the perceived advantages of knowledge and networks of clients that HUD says should not be negatively impacted by the rule. In fact, HUD predicts that RESPA reform will provide opportunities for efficient third-party firms to expand their operations. HUD goes on to state that "there is not evidence to support arguments that these 'locally-provided' services will shift to larger businesses. . . . [L]arge national title companies have to rely on local title companies in order to serve all areas."[13] Based on these comments, ALTA believes the Department is misunderstanding the anti-competitive arguments the Association made in 2002 and continues to make in response to the current proposed RESPA rule.

Notably, HUD's comments are focused on certain title-related services, such as the title search and settlement, which are local services often conducted by businesses located in the same geographic location as the subject property. As a result, it is true that when title insurance is provided by a large national company, the title search and closing services are subcontracted to local companies. This, however, is unrelated to the purchase of title insurance generally, which consumers could elect to buy from small independent title insurance agencies or a large national title provider with an office in the same geographic location.[14] In either case, the title

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[13] "Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis," Ch. 3, pp. 3-139 n. 141, available at www.hud.gov/offices/hsg/sfh/res/200803/5180RIA.pdf [hereinafter Regulatory Impact Analysis].

[14] This is evident by the Department's focus on "Title Abstract and Settlement Offices" in its Regulatory Impact Analysis on small businesses. HUD states that "Title Abstract and Settlement Offices" are defined as companies that: (1) research public land records to gather information relating to real estate titles; (2) prepare documents necessary for the transfer of title, financing, and settlement; (3) conduct final real estate settlements and closings; and (4) file legal and other documents relating to the sale of real estate." The Department also notes that that the term "title agent" is frequently used in the Regulatory Impact Analysis to refer to "Title Abstract and Settlement Offices." See Regulatory Impact Analysis, Ch. 5, pp. 5-92 n. 136. HUD, however, fails to recognize

search is a service that both the small agency and the large provider must order before a title insurance policy can be issued. However, the rule and its proposals for negotiated volume discounts will create an uneven playing field where the large national lenders and large national title companies will be able to undercut small local firms on title search prices.

When a consumer is faced with the choice of a small independent agency and a large national provider in the same geographic location to purchase title insurance, the ability to negotiate volume discounts on the local services that are incidental to the issuance of a title policy (i.e., the title search) will disadvantage the small independent agency that does not have the resources to guarantee a stream of business to a third party or discount its own services when the services are performed in house. For example, if a large provider subcontracts the title search to another company, the large title company has the flexibility to pass through a discounted fee for the title search to the consumer.[15] Because the large provider's volume of business is higher nationwide, the large provider is better positioned to absorb the difference between the discounted prices passed through to the consumer and the actual fee paid to the title search company. The small independent agency, on the other hand, likely performs the title search services in house and depends on the income produced from its title search fees to sustain its operations and compensate its handful of employees. The small agency, therefore, is competitively disadvantaged as compared to the large provider when it cannot offer the same kinds of discounts to consumers.

Similarly, title insurance companies often are required, at the request of the lender or the borrower, to overnight packages of closing documents in preparation for the settlement or after the settlement has occurred. Because large national title providers have reason to use overnight delivery services more frequently than small providers, large title companies are able to negotiate discounted overnight delivery rates and pass these discounted rates through to the consumer. A small independent title agency, however, is not in a position to negotiate corporate delivery

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that the kinds of services that define "Title Abstract and Settlement Offices" are not the core title services performed by title agents. While title agents may conduct title searches, prepare documents, conduct the closing, and record documents, these are services that often are subcontracted to local service providers, which is the focus of the Department's discussion. Title insurance agents, which may be small or large companies, are defined by the core title services they perform, including the evaluation of the title search to determine insurability of the title, the clearance of underwriting objections, the issuance of a title commitment, and the actual issuance of the policy or policies on behalf of the title insurance company. Small title insurance agents that perform these core title services are the companies that will be competitively disadvantaged by the proposed rule.

[15] This example assumes that the cost for title insurance does not include the cost of the title search. In some states, the total price for title insurance includes the cost for the title search and other incidental services (i.e., all-inclusive title insurance rate).

rates and cannot compete with the lower prices the large provider can charge its consumers. Moreover, even if the small agency were to match or beat the prices charged by the large title company, the small agency is less able to absorb the costs it does not pass through to the consumer.

Under these circumstances, the ability to negotiate discounts and pass them through to the consumer disadvantages the small title insurance agency who is unable to compete with the lower prices offered by large title insurance providers. While this may result in lower prices for the consumer in the short term, once the small title companies have been pushed out of the competitive marketplace, large providers are left to compete only among themselves. Under these circumstances, the laws of economics teach us that prices eventually will increase and be higher for the consumer, which conflicts with the Department's stated objectives for the rule.

2. Mortgage Lenders Will Favor Large Title Providers Who Offer Discounts or Their Own Affiliate Providers.

In addition to the competitive disadvantages small title companies will experience as a result of negotiated discounts, ALTA is concerned that mortgage lenders and brokers will add to the anti-competitive effects by favoring affiliated title companies or those companies that can provide title related services on a nationwide basis. Lenders are most likely to select these companies in order to more easily manage their network of service providers and the costs they must estimate.

Notably, in connection with the Department's proposals for the new GFE form, the fees for third-party settlement services, when these services are obtained from providers recommended by the lender, are subject to a 10% tolerance. By contrast, if the borrower shops for and selects his own third-party service providers, the rule proposes no restriction on the amount the fees may increase at closing. While the Association understands that these differences in tolerances are designed to hold loan originators accountable for the prices quoted on the GFE, ALTA is concerned that such a system will result in lender-created teams of settlement service providers. The lender's message to the borrower then will be: "select other settlement service providers at your own risk; we cannot guarantee that the final prices charged by those self-selected providers will not increase at closing." By virtue of emphasizing these "guaranteed" prices to consumers, lenders are able to influence and encourage a borrower's selection of a recommended provider. Yet, there is no guarantee that these recommended service providers are the least expensive or the best. Moreover, this "preferred provider" concept would take the title agent out of the role of independent fiduciary to the *transaction* and place it in the role of "sub-contractor" to the lender.

The Association is fully aware that the circumstances described above may initially result in the consumer's receipt of lower costs for title insurance and other third-party settlement services. However, these initial savings come at the expense of small title insurance providers that are unable to offer the same substantial discounts and will not make the list of lender-recommended companies. The inability to offer substantial negotiated discounts alone is enough to harm the businesses of small providers; if these companies also do not get the recommendation of loan originators, small title insurance providers will be pushed out of the marketplace. As noted above, if a limited number of large title companies are able to dominate the market, the prices for their services eventually will increase, and the incentive to compete for a borrower's business will no longer exist. The Association, therefore, urges the Department to consider these unintended consequences of the proposed rule and pursue changes that will foster an even playing field. To create a truly competitive marketplace and ensure that borrowers shop for settlement services (not just a mortgage loan), small businesses are a necessity for the title insurance market.

3. The Proposed Rule Fails to Account for State Laws that Prohibit Title Insurance Discounts.

Although the rule would allow all settlement service providers to offer negotiated volume discounts, this provision is in direct contrast to many state title insurance laws that prohibit title insurance companies and agencies from discounting the title premium or offering a rebate on title insurance fees, especially in states with "all-inclusive" rates. As a result, many title companies are unable to offer consumers discounted prices under the proposed regulations.

Notably, the majority of states in the country require title insurance underwriters to file their title insurance rates with the appropriate state regulator, as well as prohibit the companies from deviating from these rates unless the planned deviations are filed with the state. This is because most state laws require state regulators to ensure that title premiums are **adequate,** non-discriminatory, and not excessive. In these circumstances, while discounted rates (like those available in a refinance transaction) are filed with the states up front, title insurance companies do not have the freedom to reduce their title insurance rates on a per transaction basis to remain competitive with other title insurance companies. Moreover, even if two title insurance companies file varying rates in the same state for the same title insurance product, the company with the higher rate is not permitted to automatically discount its title insurance.

Furthermore, most state insurance laws include anti-rebating provisions that prohibit title insurance companies and agents from making payments and/or providing discounts as an inducement for the placement of title insurance. New

York's anti-rebating provision is one example of the broad restriction on such incentives. Specifically:

> No title insurance corporation or any other person acting for or on behalf of it, shall make any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant for insurance, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business.[16]

Under this section, a title insurance company or agency in New York would be prohibited from discounting the title insurance premium, rebating a portion of the premium to the consumer (or lender), and giving any other things of value to influence the consumer's selection of a title provider. Yet, the Department proposes to allow negotiated volume discounts as a competitive technique to lower the prices for settlement services. Given these broad state-law prohibitions on title insurance discounts, we want to emphasize to HUD the restrictions under which title companies must operate. We believe the Department's proposal for negotiated discounts will have damaging effects not only on our members but for consumers who will have fewer companies from which to select title insurance services.

III. COMMENTS ON OTHER PROVISIONS OF THE PROPOSED REGULATIONS

Although the preceding section discusses ALTA's primary concerns with the proposed rule, there are other items the Association would ask the Department to consider. Moreover, ALTA would like to respond to a few issues on which HUD has specifically requested comments. Below we identify these additional issues.

A. ALTA Supports HUD Seeking Statutory Authority to Require the HUD-1 To Be Delivered Three Days Prior to Closing Only If The Statute Also Requires Lenders To Deliver Closing Documents and Instructions Four Days Before Closing.

In addition to the regulatory changes proposed by the rule, HUD identifies several items for which the Department plans to seek statutory authority. One such

[16] N.Y. Ins. § 6409(d).

item is the authority to require the HUD-1 to be provided to the borrower three days prior to closing. Although the preamble to the proposed rule includes little discussion of this legislative proposal, ALTA asks the Department to consider certain practical effects of such a three day requirement.

First, if HUD's closing script proposal were to become a reality, both the HUD-1 and the closing script (as an addendum to the HUD-1) would have to be prepared in sufficient time by the settlement agent to provide them to the borrower three days before closing. Whether or not a settlement agent can meet this deadline, however, depends on whether the loan originator provides the settlement agent with the necessary information to complete the documents. Based on current practice, settlement agents often receive the closing package shortly before closing, which would make it nearly impossible to complete the closing script and provide it to the borrower three days prior to closing. Moreover, while the proposed rule obligates the lender to supply the settlement agent with the necessary information to complete the closing script, the rule fails to prescribe a time by which the lender must transmit this information. As a result, if the Department pursues legislative authority to require the HUD-1 and its addendums to be supplied to the borrower three days prior to closing, any such statute must obligate the lender to provide the settlement agent with all necessary information to complete these documents at least four days prior to closing.

Second, the Department should consider whether the provision of the HUD-1 and closing script three days prior to closing will fulfill HUD's objective of allowing the consumer time to review the documents, understand the loan terms, and ask clarifying questions prior to closing. Often closing documents are prepared at the last minute because changes continue to occur to the mortgage, as well as the final settlement charges. Under these circumstances, it is possible that the documents provided to the consumer three days prior to closing will still not reflect final loan terms and settlement charges, which may make the disclosures useless to the consumer. Moreover, should these documents continue to change prior to closing, the consumer is likely to be more confused about the terms of settlement than had the documents never been provided to the borrower. Regardless of this argument, closers must have adequate time to complete the preparation of the closing documents before either delivery to the consumer or closing.

B. HUD Should Allow Lenders the Opportunity to Cure any Violations of Tolerance Requirements.

Like the Association's comments to the Department's 2002 proposed RESPA rule, ALTA continues to question whether HUD has the statutory authority to require loan originators to disclose exact third party settlement charges on the GFE. Although we will not repeat our 2002 discussion of the legislative history that supports the Association's conclusion, we emphasize that the statute only authorizes a "good faith estimate" of the amount or range of charges for specific settlement services.[17] Yet, the proposed rule refers to the GFE as an offer, which the consumer should compare with the offers from other loan originators. By characterizing the GFE and its contents in this manner, it is ALTA's position that the settlement charges disclosed therein cease to become mere estimates, particularly when a lender could violate the regulations by exceeding the charges at closing.

Moreover, the Department's explanations provided in the rule to defend its proposal for tolerances are unconvincing. HUD states that the proposed GFE would not require lenders to itemize an exact list of settlement charges because the disclosure allows for flexibility. As an example, HUD notes that its proposal would allow the fees disclosed on the GFE to decrease at any time. This, however, is a circular argument. The Department states that its purpose for the revised GFE is to protect consumers from high settlement costs. If this is the case, the Department cannot at the same time justify its proposal for tolerances by emphasizing that settlement costs can always decrease. HUD further justifies the tolerances by suggesting that settlement fees may increase under the proposal in the case of unforeseeable circumstances. The Department, however, should recognize that a loan originator cannot rely on unforeseeable circumstances at the time it is required to disclose settlement charges on the GFE. These are events that have yet to occur, which means the lender must assume any third party settlement fee disclosed on the GFE will be subject to the tolerance limitations. While the Association appreciates the Department's efforts to distinguish its proposed tolerances from the former Section 6 of RESPA, we stand by the position ALTA expressed in its 2002 comments.

All that said, the Association recognizes that HUD believes it has statutory authority to impose tolerance limitation. Thus, should HUD include tolerances in its final rule, we support the Department's plan to allow a lender the opportunity to cure any violation of applicable tolerances. As discussed above, ALTA is concerned about the proposed rule's lack of guidance to the settlement agent in circumstances where a lender has exceeded the tolerances. From the standpoint of the settlement agent, if the agent identifies excess charges in settlement fees, which the rule makes a violation of RESPA, the agent may be unwilling to allow the transaction to close. If, however, the regulations allow the lender to refund any settlement fees in excess of the tolerance limitations within a certain period of time after closing, this should satisfy any concern and hesitation a settlement agent may have about closing the transaction.

IV. CONCLUSION

[17] See 12 U.S.C. § 2604(c).

The HUD proposal would create sweeping changes for all participants in the settlement services industry that would be most detrimental to small businesses. In this current, and potentially prolonged, decline in the real estate market, the Department should avoid causing any further disruption to the market and focus on incremental changes that can be achieved without adding to the economic downturn. This would avoid questions of statutory authority, Congressional and industry opposition, and result in meaningful changes that assist consumers in understanding loan and settlement terms and disclosures.

Moreover, the proposed rule seems to fit the refinance transaction far better than the home purchase transaction. In the former, only the interests of the borrower and lender are at issue, and virtually all of the settlement services are required for the benefit of the lender. In the home purchase transaction, there is a third party whose interests are affected – the seller – and the transfer of clear real estate title is the primary concern of both buyers and sellers. The loan, while perhaps essential, is secondary to the underlying real estate transaction. While ALTA realizes that RESPA applies to all transactions in which a federally related mortgage is involved, HUD should give serious consideration to limiting many of its changes to refinance transactions rather than applying them to purchase/sale transactions where there are likely to be significant unanticipated adverse effects that could threaten recovery of the real estate market.

Based on these concerns, ALTA suggests that HUD limit its efforts to simplifying only the GFE and HUD-1 so that comparisons can be more easily made between the documents. For instance, page one of HUD's proposed GFE provides information about the loan terms and total costs for settlement services in an understandable format. ALTA supports this type of summary page. But just as important, HUD must make fee disclosures more transparent by requiring the GFE to further break down and disclose individual title and closing service fees. This would allow consumers to know what is included within the total amount listed on the GFE summary page. This is imperative in a home purchase transaction where the buyer may require services that are not required by or of importance to the lender. It would also show what services are not required to be purchased by borrowers when sellers pay for certain services. HUD could easily accomplish this by requiring an additional page on the GFE that would be identical to page two of the HUD-1. Such a document would ensure that comparisons are clear and unambiguous.

Ultimately, ALTA appreciates HUD's consideration of these comments, and we respectfully request the Department to carefully evaluate the unintended consequences of the proposed rule. While the Association applauds HUD's attempts to simplify and clarify the mortgage loan and settlement process, we are concerned that certain aspects of the rule would discourage consumer shopping and burden our members with new forms of liability and anti-competitive pressures. In the midst of a credit crunch, ALTA accepts that there will be compliance costs with any new regulation; however, we see no consumer benefit in implementing a rule that will complicate the settlement process and make it more difficult for small settlement service providers to compete for business and sustain their operations. If RESPA reform is to become a reality, we urge the Department to seek the proper balance between the interests of the consumer and the interests of the industry providers who serve them.